No. 18-15982

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE FACEBOOK BIOMETRIC INFORMATION PRIVACY LITIGATION

CARLO LICATA, ADAM PEZEN, and NIMESH PATEL,
individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

FACEBOOK, INC.,
Defendant-Appellant.

On Petition for Permission to Appeal from the
United States District Court for the Northern District of California
No. 3:15-cv-03747 (Donato, J.)

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

REGINALD J. BROWN
PATRICK J. CAROME
JONATHAN G. CEDARBAUM
KELLY P. DUNBAR
Counsel of Record
SAMUEL M. STRONGIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus* briefs in cases raising issues of concern to the nation's business community.[1]

Members of the Chamber regularly face abusive class-action litigation, including litigation brought under state law. The Chamber thus often participates as an *amicus* in cases raising significant questions of class-action law. *See, e.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Corber v. Xanodyne Pharm., Inc.*, 771 F.3d 1218 (9th Cir. 2014) (en banc). The Chamber has a strong interest in ensuring that courts faithfully apply the Supreme Court's decisions in *Wal-Mart Stores, Inc. v.*

[1] No party or party's counsel authored this brief in whole or in part. No party, no party's counsel, and no person other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Dukes, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), to prevent abuse of the class-action mechanism. To that end, the Chamber filed an *amicus* brief in support of Facebook's Rule 23(f) petition, *see* Chamber of Commerce Br., No. 18-80053 (May 7, 2018), Dkt. 6-2; Order, No. 18-80053 (May 29, 2018), Dkt. 24 (granting motion for leave to file), as well as an *amicus* brief on the merits, *see* Chamber of Commerce Br., No. 18-15982 (Oct. 16, 2018), Dkt. 10; Order, No. 18-15982 (July 25, 2019), Dkt. 80 (granting motion for leave to file).

The three-judge panel affirmed the Article III standing and certification of a vast class of potentially millions of unharmed Facebook users seeking billions of dollars in damages. Because the panel's decision presents several questions of "exceptional importance," Fed. R. App. P. 35(b)(1), under both the Constitution and Rule 23, the Chamber has a direct and substantial interest in en banc review of the panel's decision.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Chamber agrees with Facebook that en banc review of the panel's decision is urgently needed. The panel's decision affirming certification of a class of Facebook users seeking billions of dollars in damages without any evidence of actual harm conflicts with both Supreme Court and Circuit precedent in many ways, as Facebook persuasively explains. If allowed to stand, the panel's holdings will make it easier for plaintiffs' counsel to pursue even meritless class actions,

with devastating harm for businesses generally and technology companies in particular, discouraging investment and innovation, and ultimately harming the public.

The Chamber writes separately to emphasize two aspects of the panel's opinion that will cause significant harm for U.S. businesses:

First, the panel decision permits class-action plaintiffs to establish Article III standing without *any* showing of harm beyond a bare statutory violation. In doing so, the panel permitted a "no-injury" class action seeking potentially billions of dollars in damages to go forward without requiring any showing of real-world harm. Indeed, the panel held that the plaintiffs had demonstrated Article III standing despite concessions that they had not, in fact, been harmed. That holding disregards binding precedent, as Facebook explains. Correcting the panel's error is imperative because its decision vitiates an important threshold constitutional check on no-injury class actions in any case involving a statutory privacy interest. Such no-injury class actions risk devastating consequences for U.S. businesses, particularly technology companies, as this case well illustrates.

Second, Supreme Court precedents dictate that courts must rigorously analyze whether common issues predominate *before*, not *after*, class certification. By contrast, the panel's decision endorses a "certify-first-ask-hard-questions-later" approach that would result in many improper classes being certified. The panel's

erroneous decision to affirm class certification under Rule 23(b)(3) simply because the putative class shares some common threshold statutory interpretation questions under the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, would make class actions of all types easier to certify at the outset. That, too, would encourage abusive class actions. And the *in terrorem* settlement pressures arising from improperly certified classes would lead to the settlement of the kinds of frivolous or weak claims that Rule 23 was designed to screen out.

ARGUMENT

I. The panel's erroneous standing analysis all but eliminates Article III's concrete-injury requirement in privacy class actions, encouraging abusive and costly litigation.

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). This requirement is not "automatically satisfie[d] … whenever a statute grants a person a statutory right and purports to authorize that person to sue." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). "[E]ven when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017).

Because standing is "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To move past the summary-judgment stage, plaintiffs must point to evidence in the record of specific facts, which, taken as true, establish standing. *Id.*; *see* Fed. R. Civ. P. 56(c)(1)(A). Moreover, this Court may properly consider injury-in-fact on interlocutory appeal because standing is an Article III requirement for federal jurisdiction. *E.g.*, *Civil Rights Educ. & Enf't Ctr. v. Hospital Props. Tr.*, 867 F.3d 1093, 1098-1099 (9th Cir. 2017).

The named plaintiffs in this case did not simply fail to introduce evidence of real-world injury, they affirmatively conceded that they suffered *no* negative consequences from Facebook's purported violations of BIPA. *See* Facebook Pet. 5-6.[2] The plaintiffs likewise failed to explain what they would have done differently had they received the disclosures BIPA purportedly requires instead of the disclosures Facebook provided. *See id.* Those failures to provide evidence—indeed, disavowal—of concrete, real-world harm defeat plaintiffs' Article III standing. *See Spokeo*, 136 S. Ct. at 1549; *Lujan*, 504 U.S. at 561.

[2] Citations to "Facebook Pet." are to Facebook's petition for rehearing en banc, Dkt. 90-1.

Despite plaintiffs' concessions and the absence of evidence of harm, the panel held that the plaintiffs had nevertheless carried their burden to show Article III standing. In doing so, the panel endorsed a two-step framework that would automatically support standing in many (if not all) cases that even arguably related to privacy absent any real-world harm. First, the panel characterized BIPA's notice provisions as "substantive" based on a standard that would cover virtually all privacy provisions. Op. 13, 16-18. Second, the panel concluded that conduct implicating a substantive *statutory* interest always supports standing even without real-world harm. *Id.* at 18-20. Those conclusions violate Supreme Court precedent and deepen conflicts with cases from both this Circuit and others. *See* Facebook Pet. 7-14. That error alone warrants en banc review.

The practical consequences of the panel's approach—permitting a class seeking billions of dollars in potential liability to proceed—underscore the need for en banc review. But such review is additionally warranted because, by removing an important threshold Article III restraint on no-injury class actions, and in that way making such suits easier to bring, the panel's two-step standing approach would encourage abusive and costly litigation that harms U.S. businesses generally, and technology companies in particular.

No-injury class actions cause unique harms and invite abuse for several reasons. For starters, without any need to show individualized, real-world harm

(whether for Article III purposes or otherwise), class counsel could easily circumvent Rule 23's commonality and predominance requirements (as happened here), obtaining certification of enormous and improper classes. A threshold harm requirement makes class certification harder. If each plaintiff must meet this requirement, class counsel will rarely be able to show that all class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (quotation marks omitted). The individualized-harm issues can thus defeat commonality, barring class certification. *See* Fed. R. Civ. P. 23(a)(2). The harm question will also frequently defeat predominance, *see* Fed. R. Civ. P. 23(b)(3), because the need for plaintiff-specific proof means that the proposed class may not be "sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

With Rule 23's requirements weakened and without a meaningful Article III check, no-injury class actions allow plaintiffs' attorneys to leverage statutory damages for technical violations into massive threatened liability. When provided, statutory damages for individual plaintiffs are often relatively modest. For example, BIPA permits plaintiffs to recover, for each statutory violation, the greater of actual damages or liquidated damages that vary depending on the nature of the violation ($1,000 for negligent violations, $5,000 for intentional or reckless ones). *See* 740 ILCS 14/20(1)-(2); *cf.* 15 U.S.C. § 1681n(a)(1)(A)-(B) (imposing

similar tiered scheme for willful noncompliance with the Fair Credit Reporting Act). Given these amounts, an economically rational plaintiff who suffered no actual harm from a technical statutory violation might not choose to sue. But the incentives flip (at least for plaintiffs' lawyers) if plaintiffs can aggregate their statutory damages through a class action, as potential recoveries can quickly skyrocket to billions of dollars. *See, e.g.*, Johnston, *High Cost, Little Compensation, No Harm To Deter*, 2017 Colum. Bus. L. Rev. 1, 68-69.

These massive potential damages impose significant costs on the defendant companies and the broader economy. Judge Wilkinson has highlighted these costs in the context of a federal statute. The combination of Rule 23's class action provisions and a "modest range of statutory damages," he warned, may together create "a perfect storm in which two independent provisions combine to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially). This perfect storm, Judge Wilkinson recognized, "is a real jobs killer" that no legislature would want to sanction. *Id.* As he explained, "the relatively modest range of statutory damages chosen by [a legislature] suggests that bankrupting entire businesses over somewhat technical violations was not among [it's] objectives." *Id.*; *accord Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 27 (2d Cir. 2003) (Newman, J., concurring).

When a no-injury class action threatens a business with massive liability, the shareholders are not the only ones at risk—the entire company may face ruin, putting employees at risk too. *See Stillmock*, 385 F. App'x at 279 (Wilkinson, J., concurring specially). "It staggers the imagination," Judge Wilkinson observed, "to believe that [a legislature would] intend[] to impose annihilating damages on an entire company and the people who work for it for lapses of a somewhat technical nature and in a case where not a single class member suffered actual harm." *Id.* at 280. And it is not just large companies such as Facebook that face these risks; no-injury class actions pose potentially even greater danger for smaller business that may not be able to afford litigation costs or assume liability risk.

The potential for crushing liability from no-injury class actions distorts litigation incentives for both plaintiffs and defendants at society's expense. Large potential awards encourage meritless litigation with no social benefit. No-injury class actions are highly lucrative for class counsel, who take a slice of the recovery. The large attorneys' fees that come with such class actions enrich class counsel without benefiting the class.

In that vein, the Supreme Court has recognized that "benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). These "chief beneficiaries" are often class counsel, as "class

action attorneys are the real principals, and the class representative/clients their agents." 1 Rubenstein, *Newberg on Class Actions* § 3:52, at 327 (5th ed. 2011). And because class counsel takes a proportional share of any recovery, even a small fraction of billions of dollars is a significant incentive to pursue class actions, regardless of their merits. The greater the potential damages, the greater the incentive to bring a meritless class action with little chance of success in the hopes of extracting an *in terrorem* settlement.

Where a large class of plaintiffs is certified, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 296 n.7 (2014) (Ginsburg, J., concurring) (recognizing *in terrorem* settlement pressure); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class … places pressure on the defendant to settle even unmeritorious claims. When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury." (internal citation omitted)); *Parker*, 331 F.3d at 22 ("aggregation in a class action of large numbers of statutory damages claims … could create … an *in terrorem* effect on defendants, which may induce unfair settlements"). Importantly, this settlement

pressure has little to do with the merits of the claims, as the threat of crushing liability from frivolous or weak claims distorts defendants' litigation incentives and lead to unfair settlements. The risk of ruinous class action liability, and the settlement of weak class actions, is a major drain on U.S. businesses and thus on the entire economy. No-injury class actions make this drain even worse.

Technology companies may be especially vulnerable to abusive no-injury class actions relating to privacy. As this case shows, millions of Internet users interact every day with technology companies to conduct transactions, share content, and connect with people all over the world. Indeed, the Internet's unique efficiency and worldwide reach enable technology companies to deliver enormous value at little or no cost to their users. The resulting huge volume of daily users and interactions exposes technology companies to enormous class actions for minor, technical violations. As a result, technology companies are more likely to face potentially ruinous statutory damages that dramatically amplify the *in terrorem* settlement pressure. *E.g.*, *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4-5 (N.D. Cal. Mar. 18, 2013) ($9 million settlement in case alleging statutory damages of $150 billion).

In short, by improperly diluting threshold constitutional restraints on no-injury class actions under Article III, the panel's decision poses a significant threat to businesses. No-injury class actions such as this case—allowing potentially

millions of Facebook users to sue for potentially billions of dollars in damages without demonstrating that anyone suffered any real-world harm—impose enormous burdens on U.S. businesses, with little if any countervailing social benefit. En banc review is necessary to restore Article III standing as a meaningful check on privacy no-injury class actions.

II. The panel deliberately ignored individualized extraterritoriality questions, improperly deferring them until after certification.

The Supreme Court has emphasized that a "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp v. Behrend*, 569 U.S. 27, 33 (2013). As a result, parties "seeking to maintain a class action 'must affirmatively demonstrate [their] compliance' with Rule 23," and district courts must "'rigorous[ly]'" assess compliance with the rule's requirements. *Id.*; *see also In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc).

The panel's Rule 23(b)(3) predominance analysis upends those requirements. Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." As Facebook argued, both to the district court and before the panel, Illinois's extraterritoriality doctrine defeats predominance. Under Illinois law, a state statute does not apply outside Illinois's borders "unless an intent to do so is clearly expressed." *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 852-

853 (Ill. 2005). Because all agree that BIPA does not apply extraterritorially, the statute creates liability only for conduct "occurr[ing] primarily and substantially in Illinois." *Id.* at 854. To fall within BIPA's domestic scope, moreover, "the majority of circumstances related to the [alleged violation]" must have occurred within the State. *Landau v. CNA Fin. Corp.*, 886 N.E.2d 405, 407-409 (Ill. App. Ct. 2008). A case falls outside the statute if a "necessary element of liability d[oes] not take place in Illinois." *Graham v. Gen. U.S. Grant Post No. 2665, VFW*, 248 N.E.2d 657, 658-659 (Ill. 1969).

These state-law extraterritoriality principles defeat predominance because they require an individualized inquiry to determine whether a "majority of circumstances" relating to the alleged violation of each class member's rights under BIPA occurred in Illinois. The panel agreed that Illinois law "requires a decision as to where the essential elements of a BIPA violation takes place." Op. 22. And it proposed only three locations where a violation could occur: where a class member uses Facebook; where Facebook scans photographs and stores face templates; or in some other place or combination of places. *Id.* at 22-23. As Facebook explains, however, the class certification order cannot stand in those scenarios: the first would require an individualized inquiry as to where a class member primarily used Facebook; the second by definition includes no Illinois

class members; and the third would necessarily require individualized assessments. *See* Facebook Pet. 18.

Attempting to sidestep these obvious problems, the panel reasoned that the "threshold" legal questions of statutory interpretation "can be decided on a class-wide basis," and if "extraterritoriality must" later "be evaluated on an individualized basis, the district court can decertify the class." Op. 22-23. This procedural dodge disregards a court's fundamental obligation to conduct a rigorous predominance inquiry *before* certification.

"[C]ertification is proper only if '[a] court is satisfied, after a rigorous analysis, that [Rule 23's requirements] have been satisfied." *Wal-Mart*, 564 U.S. at 351. The panel thus should have determined governing state law and *then* decided whether its application requires individualized or class-wide proof. *Comcast*, 569 U.S. at 33; *cf. In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("The issues raised by the apparent existence of numerous individual questions *must be resolved before a class is certified*, even if certification is conditional." (emphasis added)). The panel's decision to short-circuit that inquiry—asking only whether purely legal statutory interpretation issues could be resolved class-wide, without worrying about the application of those statutory standards to class members—defies the Supreme Court's instruction that a party seeking class certification "'must affirmatively demonstrate … compliance' with

Rule 23," *Comcast*, 569 U.S. at 33, as well as the Court's mandate that a certifying court "'satisf[y]'" itself that the strictures of Rule 23 are met, *id.*

Left uncorrected, the consequences of the panel's error for future class-certification decisions in the Ninth Circuit would be significant. By permitting certification in any case in which class counsel can imagine some threshold statutory issues common to the class, the panel's decision would undermine Rule 23's important safeguards and encourage plaintiffs' counsel to bring more abusive class actions with the hope of obtaining an initial certification and using it to leverage unfair settlements. This would exacerbate *in terrorem* settlement pressures already associated with class actions. *See supra* pp. 10-12. En banc review is needed to correct the panel's significant errors and to ensure that Rule 23(b)(3)'s predominance requirement serves as a meaningful check on abusive and costly class actions.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

/s/ Kelly P. Dunbar

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

REGINALD J. BROWN
PATRICK J. CAROME
JONATHAN G. CEDARBAUM
KELLY P. DUNBAR
Counsel of Record
SAMUEL M. STRONGIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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